(3)

No. 00-1386

SUPREME COURT, U.S.
FILED
APR 26 2001
CLERK

In The

Supreme Court of the United States

CLIFFS ON THE BAY CONDOMINIUM ASSOCIATION,

Petitioner,

v.

EARL D. SMITH AND SUZANNE C. SMITH,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

REPLY BRIEF

ROBERT M. MEISNER
Counsel of Record
RICHARD M. DELONIS
MEISNER & ASSOCIATES, P.C.
30200 Telegraph Road, Suite 467
Bingham Farms, MI 48025-4506
(248) 644-4433
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

11 pp

TABLE OF CONTENTS

Page

I. RESPONDENTS' ATTEMPT TO DISTINGUISH PRIOR DECISIONS OF THIS COURT FROM THE INSTANT MATTER IS ERRONEOUS 1

II. THIS CASE PRESENTS A SUBSTANTIAL FEDERAL ISSUE WHICH WARRANTS REVIEW OR SUMMARY REVERSAL 4

III. THE RECORD BELOW IS ADEQUATE FOR APPELLATE REVIEW..... 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES:

STATE

Schwartz v. Dey, 780 S.W. 2d 42 (Mo.1989)..... 5

FEDERAL

Covey v. Town of Somers, 351 U.S. 141 (1956)...1, 3, 4, 5

Robinson v. Hanrahan, 409 U.S. 38 (1972).... 1, 2, 3, 4, 5

REPLY BRIEF

Cliffs on the Bay Condominium Association ("the Association") respectfully submits this Brief in reply to points raised in the Brief in Opposition filed by Earl D. Smith and Suzanne C. Smith ("Respondents"). As illustrated below, the arguments asserted by Respondents in the Brief in Opposition are not compelling, and do not diminish the significance of the issues raised in the Petition, and are otherwise insufficient to oppose either a summary reversal in this matter of the judgment of the Michigan Supreme Court below, or a grant of a writ of certiorari to review the judgment and hold a full and fair hearing on the important constitutional issues presented.

I. RESPONDENTS' ATTEMPT TO DISTINGUISH PRIOR DECISIONS OF THIS COURT FROM THE INSTANT MATTER IS ERRONEOUS.

In their Brief in Opposition, Respondents first argue that the decision of the Michigan Supreme Court in this case does not conflict with relevant prior decisions of this Court. To propound such an argument, they claim that the instant matter is somehow entirely distinguishable from the circumstances present in *Robinson v. Hanrahan*, 409 U.S. 38 (1972), and *Covey v. Town of Somers*, 351 U.S. 141 (1956). Since those cases are distinguishable, they argue, there is no conflict. Despite Respondents' contentions, however, the Michigan Supreme Court decision in this matter *does* conflict with the holdings of this Court in *Hanrahan* and in *Covey*, as those cases are not distinguishable in regard to the central issue present in this case and,

therefore, the clear and direct conflict between the holding below in this matter and the prior decisions of this Court is not negated.

In *Hanrahan*, it cannot be disputed that the state simply followed the statutory notice procedure and sent the notice of the vehicle forfeiture to the address listed in the records of the Secretary of State. This Court determined, however, that mere compliance with the statutory notice procedure was not enough to satisfy procedural due process requirements, because this Court looked *beyond* the compliance with statutory procedure and held that the notice given was constitutionally deficient since the state knew that the accused was not at the address to which the notice was sent. Similar circumstances are present in this matter as well. Here, the Department of Treasury was attempting to merely comply with a state statute when it mailed the notice regarding the tax sale proceedings to the Association. It is uncontested that the notice was returned by the post office as "Not Deliverable As Addressed". The Department *knew*, then, that the Association did not receive the notice, but undertook no further effort whatsoever to ascertain the Association's correct address, which was a matter of public record and, as pointed out in the Petition, could have easily been obtained through a simple telephone call. The Association had dutifully supplied its correct address to the State of Michigan's Corporation and Securities Bureau, as required by law, *for the very purpose* of facilitating the service of notices of official proceedings involving the rights of the Association, a nonprofit corporation. Nevertheless, that was not the address to which the notice at issue in this case was sent. Instead, the notice was simply

sent to the significantly outdated address that was originally reflected on the local government's tax rolls, and the Michigan Supreme Court held that such minimal "effort" complied with the statutory notice provisions and, therefore, constituted sufficient "notice". The Michigan Supreme Court did not look beyond the statutory requirements. The holding clearly conflicts with the decision in *Hanrahan*.

In *Covey*, a notice of tax foreclosure was sent by mail, as required by statute, to a person known to be incompetent. The "service" of the notice was declared by this Court to be constitutionally deficient, although the method of "service" complied with the applicable state statute. This Court based its holding on the fact that the taxpayer was known to be incompetent, and efforts were not made by the taxing authority in that case to provide the protection of a guardian before the service of the notice. Similarly, in this case, the Department of Treasury knew that the Association did not receive the notice that was allegedly sent to it regarding the tax sale proceedings. Yet, it did nothing to rectify the matter and take reasonable steps to provide sufficient notice to the Association.

In their Brief in Opposition, Respondents attempt to distinguish *Hanrahan* and *Covey* by suggesting that there was an "active attempt" by the taxing authorities in the aforementioned cases to prevent the taxpayers from receiving notice, and that no similar circumstance is present here. Significantly, however, there was no such finding by the Court of an "active attempt to prevent notice" underlying the decisions in either *Hanrahan* or *Covey*.

Rather, such a characterization is merely the Respondents' own "spin" on the facts in those cases, and was asserted in an attempt to manufacture a basis upon which to claim that *Hanrahan* and *Covey* can be distinguished from the instant matter. They cannot be so distinguished. Rather, it is clear that the operative facts of *Hanrahan* and *Covey* are sufficiently similar to the instant matter that a consistent conclusion in all three cases should have been rendered. Instead, the Michigan Supreme Court departed from *Hanrahan* and *Covey* and held that procedural due process requirements were met in this case. Hence, a direct conflict exists that warrants the grant of certiorari in this case as set forth in the Petition.

II. THIS CASE PRESENTS A SUBSTANTIAL FEDERAL ISSUE WHICH WARRANTS REVIEW OR SUMMARY REVERSAL.

Another argument asserted by Respondents in their Brief in Opposition is that this matter allegedly does not present a substantial federal question because "the highest court of several states have (sic) addressed the issue presented in the instant case." Brief in Opposition, at p. 9. Respondents then cite a number of state cases in their Brief that stand for the proposition that procedural due process requirements are satisfied when a taxing authority sends a notice to the "last known address", the address on the tax rolls, or the deed itself. None of the cases cited by Respondents in their Brief, however, involve a corporate entity that had provided its current address to a state agency for the very purpose of service of process. Thus, those state cases did *not* directly address the precise issue presented in this case.

Indeed, in one of the cases cited by Respondents, *Schwartz v. Dey*, 780 SW 2d 42 (MO 1989), the Missouri Supreme Court, while ruling that procedural due process requirements were satisfied even though the notice was sent to an incorrect address, specifically acknowledged that:

> *[N]otice by mail does not in all cases discharge the state's duty. When the state knows that notice by mail will be ineffective, more extensive forms of notice may be required.* See, e.g., *Robinson v. Hanrahan*, 409 U.S. 38, 93 S.Ct. 30, 34 L.Ed.2d 47 (1972) (notice of forfeiture procedure mailed to an address known by the state to be inaccurate was defective); *Covey v. Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956) (mailed notice to a taxpayer known to be incompetent and incapable of understanding such notices was insufficient to afford her notice of a foreclosure sale). *In this case, plaintiffs do not contend that the collector knew their address of record was incorrect or that their correct address was information in the public domain.*

Id., at 44 (emphasis added). Thus, it is evident that the *Schwartz* case is substantially dissimilar to the circumstances present in the instant matter, because here, unlike in *Schwartz*, the Association's correct address *was* information in the public domain.

Accordingly, the Respondents' argument that the issue presented in this case has already been addressed by various state courts and that such decisions are in concert with the opinion of the Michigan Supreme Court in this matter is clearly erroneous. As set forth in the Petition, the opinion below of the Michigan Supreme

Court should be summarily reversed, or this Court should review the important constitutional question presented by this case, and set the matter for briefing and oral argument.

III. THE RECORD BELOW IS ADEQUATE FOR APPELLATE REVIEW.

As their final effort to attempt to persuade this Court not to review this matter or grant a summary reversal, Respondents contend that the record below is somehow incomplete or otherwise insufficiently developed, rendering the case inappropriate for review. Their contention, however, is incorrect. Ironically, it was the Respondents' own Motion for Partial Summary Disposition, as granted by the trial court, that was the basis for the appeal in this matter. If the record was as factually insufficient as the Respondents now claim (disingenuously), such a circumstance would have, of course, precluded summary disposition in the first place. Hence, when they first brought their Motion before the trial court, Respondents were obviously satisfied that there were enough undisputed facts available for the trial court to issue a ruling on their claim and the Association's defenses as a matter of law without proceeding to trial for fact-finding by the court. Now, when the result is being challenged, Respondents suddenly claim that the facts in this matter are not "developed" sufficiently to allow appellate review. Significantly, Respondents did not raise this issue below in the proceedings before the Michigan Court of Appeals or the Michigan Supreme Court, but do so here for the first time. Apparently, of course, the lower courts must have

been satisfied that sufficient facts existed in the record to permit appellate review because those courts *did* review this matter and they issued opinions. In fact, additional stipulated facts were submitted to the Michigan Supreme Court by the parties when that Court requested them. Respondents are simply attempting to manufacture another argument to contend that this Court should decline to hear this matter and decline to summarily reverse the egregious decision of the Michigan Supreme Court. It is clear that the operative facts necessary to decide the important constitutional questions presented in this matter are established and sufficient, as reflected in the record below, and as detailed in the Statement of the Case contained in the Petition. Indeed, in commenting on the factual record, the Michigan Supreme Court, in its opinion below, specifically stated: "While the inadequacy of the record leaves some uncertainties, *they are not critical for the disposition of this case.*" Petition, App. 4 (emphasis added).

CONCLUSION

Based on the above, and the reasons stated in the Petition, the Petition for Writ of Certiorari should be granted, and (1) the judgment below should be summarily reversed, or (2) the case should be set for briefing and oral argument.

Respectfully submitted,

ROBERT M. MEISNER
Counsel of Record
RICHARD M. DELONIS
MEISNER & ASSOCIATES, P.C.
30200 Telegraph Road, Suite 467
Bingham Farms, MI 48025-4506
(248) 644-4433
Counsel for Petitioner